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VOON LEE SHAN v. C/INSP I/14105 ANOI KIAN & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
MAIRIN IDANG JC
[SUIT NO: 21-8-2010-II]
1 OCTOBER 2014

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TORT: *Malicious prosecution – Elements of action – Plaintiff charged under s. 216 Penal Code – Whether defendants acted with reasonable and probable cause in instituting charges against plaintiff – Delay in conducting investigation – Whether raised serious question on availability of sufficient evidence – Motive – Whether element of malice proved – Whether there was intention to punish, defame and embarrass plaintiff – Whether Government of Malaysia vicariously liable*

C

CIVIL PROCEDURE: *Damages – Assessment of damages – Malicious prosecution – Compensatory damages – Whether amount of damages proved – Whether evidence adduced to assist court in quantifying damages – Whether plaintiff suffered injury to reputation and feelings – Whether nominal and exemplary damages awarded*

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The plaintiff, a former senior police officer, an advocate and solicitor of the High Court of Sabah and Sarawak and a former Member of Parliament claimed damages for, *inter alia,* malicious prosecution, unlawful arrest, assault and defamation suffered due to the conduct of the first, second, third and fourth defendants as servants, employees and/or agents of the fifth defendant, *ie,* the Government of Malaysia. The first and second defendants were police officers, whereas the third defendant was the "Ketua Polis Daerah". On 11 July 2000, the plaintiff appeared in a remand proceeding, acting on behalf of an accused person ('Hendrick'). The first defendant applied for a 14 day remand against Hendrick but the Magistrate upon hearing the submissions of the plaintiff, released Hendrick unconditionally. The first defendant attempted to re-arrest Hendrick outside the court but after exchange of words with the plaintiff, the first defendant made no further attempt to re-arrest Hendrick. Some 27 months later, the plaintiff was arrested for an offence framed under s. 216 of the Penal Code and was subsequently charged and acquitted at trial. In a period spanning seven years, the plaintiff's acquittal was appealed all the way to the Court of Appeal and the plaintiff was vindicated of all the charges. It was the plaintiff's case that the charge against him was malicious and scandalous, with the intention to punish, defame and embarrass him for successfully resisting a remand application instituted against Hendrick. During trial, the plaintiff testified that the second defendant told him that since he had embarrassed the police, the plaintiff should be made to "pay for it". On the contrary, the defendants argued that the arrest and prosecution of the plaintiff were lawful and in accordance to due legal process.

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Held (awarding plaintiff nominal sum of RM1 and exemplary damages of RM10,000):

(1) The plaintiff's conduct clearly showed that he was aware that there was a valid warrant of arrest against him at all material times and therefore, the claim for unlawful detention could not be substantiated. The only evidence produced as to the claim for assault and battery was through the plaintiff's oral testimony. Crucial witnesses were not called. As such, the plaintiff's claim for unlawful arrest, assault and battery and unlawful detention failed. (paras 10 & 11)

(2) The plaintiff was a truthful and reliable witness. The words "… made to pay for it" established the state of mind of the first and second defendants at that point. Over the period of two years and three months, the defendants had chosen not to contact the plaintiff to assist them in their investigations, but instead, decided to ambush the plaintiff when he least expected to be wanted by the police. The plaintiff was not a runaway convict whose whereabouts were unknown but a member of the Bar and a political figure whose contact particulars could easily be obtained by the defendants. In the circumstances, the defendants had already formed in their mind to charge the plaintiff in court at the time the plaintiff was put under arrest. (paras 17, 24 & 25)

(3) An offence under s. 216 of the Penal Code is a serious offence and having taken almost 27 months to produce and present an incomplete investigation before the court must have raised further questions in one's mind. Further, the delay was without reasonable explanation. Such a delay indicated that the eventful arrest of the plaintiff bore all the characteristics of a retributive afterthought on the part of the first, second and third defendants. (para 25 & 26)

(4) The fourth defendant, *ie,* the Attorney General, was misled by the first, second and third defendants in that the former could not have known that the said trio had an ulterior motive in conducting the investigation and prosecution against the plaintiff. In the circumstances, there was no sufficient evidence to impugn the actions of the fourth defendant. The charge against the plaintiff under s. 216 of the Penal Code and the subsequent appeals was tainted with some form of illegality and procedural impropriety. An offence as serious as this ought to be given some form of priority. The fact that the defendants took their time to charge the plaintiff ought to raise some serious questions not only as to the availability of sufficient evidence to prosecute him but also as to the first, second and third defendants' true motives. There was no reasonable and probable cause to have pursued the plaintiff since it ought to have been clear to any reasonable police officer that the element of intent as required under s. 216 was clearly absent. (paras 29, 30, 31 & 34)

(5) The contempt and malice simmering in the minds of the first, second and third defendants, particularly the first defendant, which then contagiously infected the rest of the individuals involved in the prosecution of the plaintiff was palpable, evident and undeniable. Their purpose was to cause as much distress, embarrassment, anxiety and inconvenience as possible to the plaintiff. It was to make the plaintiff "pay" for embarrassing the first defendant. The first defendant did not act professionally as a police officer since her emotions were running high. Further, she even testified during the plaintiff's criminal trial, *inter alia,* that she did not expect the remand proceeding to go against her. The vigorous defence of Hendrick by the plaintiff further angered the first defendant and the latter was "seething with anger" against the plaintiff. Instead of invoking the proper channel to address her dissatisfaction in the release of Hendrick by filing an appeal or making an application for revision, the first defendant had chosen the path which had ultimately led to this suit. (paras 38, 42 & 43)

(6) On the balance of probabilities, the first, second and third defendants had acted with malice in arresting and pursuing the plaintiff. There was no place under the laws of Malaysia for police officers to use their powers for retributive or personal reasons. As such, the first, second and third defendants were liable to the plaintiff for the tort of malicious prosecution. However, there was insufficient evidence to establish, malice against the forth defendant and accordingly the plaintiff's claim against the forth defendant failed. As the fifth defendant was the employer of the first, second and third defendants, the fifth defendant was found to be vicariously liable to the plaintiff for the tort of malicious prosecution as there was no evidence that the first, second and third defendants were on a 'frolic of their own'. The defence of absolute privilege, however, was applicable in relation to the claim for defamation. (paras 45 & 46)

(7) When a plaintiff sued for damages, it was not enough to simply show that the defendant was liable or to ask the court to assess his claim for damages. The plaintiff must go further and quantify or account for the extent to which he had been damaged. On the facts, the plaintiff had not adduced any evidence to assist the court in quantifying the extent of damages caused to him. However, the plaintiff must have suffered some form of injury to his reputation and feelings when considering his standing in the society. Due to the distinct lack of evidence as to compensatory damages, the nominal sum of RM1 was awarded to the plaintiff and RM10,000 for exemplary damages. The claim for aggravated damages was not allowed. (paras 53-56)

Case(s) referred to:
Bird Dominic Jude v. PP [2014] 4 CLJ 133 FC ***(refd)***
Bonham-Carter v. Hyde Park Hotel Ltd [1948] 64 TLR 177 ***(refd)***
Chan Yoke Sim v. Choong Teck Fook & Ors, [2013] 1 LNS 425 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor [2010] 5 CLJ 301 HC ***(refd)***
Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***
Herniman v. Smith [1938] AC 305 ***(refd)***
Hicks v. Faulkner (1878) 8 QBD 167 ***(refd)***
Nam Ho Travel Service (S) Pte Ltd v. Progressive Insurance Sdn Bhd [1994] 1 CLJ 280 HC ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
PP v. Voon Lee Shan [2007] 9 CLJ 694 HC ***(refd)***
Rawther v. Abdul Kareem [1966] 1 LNS 154 FC ***(refd)***
Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA ***(refd)***
Subramaniam Paramasivam & Ors v. Malaysian Airline System Bhd [2002] 1 CLJ 230 HC ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Legislation referred to:
Penal Code, s. 216

For the plaintiff - RJ Noel; M/s RJ Noel Advocs
For the defendants - Mohd Taufik; SFC

Reported by Kumitha Abd Majid

JUDGMENT

Mairin Idang JC:

Introduction

[1] The plaintiff, a former senior police officer in the Royal Malaysian Police Force for more than 17 years, an advocate and solicitor of the High Court of Sabah and Sarawak and a former Member of Parliament claims damages for, *inter alia*, malicious prosecution, unlawful arrest, assault and defamation which he suffered in the hands of the first, second, third and fourth defendants as servants, employees, and/or agents of the fifth defendant.

[2] The plaintiff had appeared in a remand proceeding, acting on behalf of an accused person known as Hendrick Tan Boon Kai ("Hendrick Tan") on 11 July 2000 at the District Office, Kota Samarahan. The first defendant, Anoi binti Kian ("DW2"), who was then an Inspector, had appeared to apply for a 14 day remand against the said Hendrick Tan but the magistrate upon hearing the submissions of the plaintiff, released the said Hendrick Tan unconditionally. As it followed, outside the court, the first defendant had attempted to re-arrest the said Hendrick Tan. But after an exchange of words with the plaintiff, the first defendant desisted and as I find, made no further

attempt to re-arrest the said Hendrick. The plaintiff and Hendrick Tan were then driven away together in a car driven by a former employee of the plaintiff, who was not called to be a witness in this case.

[3] The first defendant then lodged a police report of which set in motion the process leading to the prosecution against the plaintiff.

[4] The plaintiff has brought these proceedings because of what happened subsequently. He was arrested for an offence framed under s. 216 of the Penal Code, some 27 months later in October 2002, and was subsequently charged and acquitted at trial. The plaintiff's acquittal was appealed all the way to the Court of Appeal in a period spanning seven years. Along each step of the way along this woeful journey, the plaintiff was vindicated of all charges.

[5] For the purposes of this action it is the plaintiff's case that the charge against him was, from the very first day, malicious and scandalous, with the intention to punish, defame and embarrass him for successfully resisting a remand application instituted against the said Hendrick Tan. The defendants were embarrassed and angry and brought into play the whole machinery of the police force and the prosecution to 'get him' for what he did. In nuce, the defendants sought retribution. The first defendant, told the plaintiff that she never expected, at all, that the remand application would fail. She was, clearly angry at this outcome and therefore, I find that she was the initiator of the prosecution against the plaintiff. If the first defendant was motivated by the need to seek retribution and not by a *bona fide* sense of duty, then I must hold that her actions were an abuse of the process for which the first, second and third defendants are collectively responsible. I will reserve my findings on this point for the conclusion of this ruling.

[6] The defendants' case on the other hand is that the arrest and prosecution of the plaintiff were lawful and in accordance to due legal process, and that the information on which the prosecution was based was entirely proper.

The Plaintiff's Claim

[7] In an action for malicious prosecution a claimant must prove first that he was prosecuted by the defendant, that is to say that the law was set in motion against him on a criminal charge; second, that the prosecution was determined in his favour; third, that it was without reasonable and probable cause; and fourth, that it was malicious. (See Federal Court case of *Rawther v. Abdul Kareem* [1966] 1 LNS 154; [1966] 2 MLJ 201)

[8] The plaintiff is claiming against the defendants for the following causes:

(a) Unlawful arrest, assault and battery;

(b) Unlawful detention;

(c) Malicious prosecution;

(d) Defamation; and

(e) Damages for injury to feelings, anxiety, stress, distress, mental worry and inconvenience.

[9] I shall deal with these accordingly under its relevant subheadings.

Unlawful Arrest, Assault And Battery, Unlawful Detention

[10] The plaintiff's evidence under this heading was through his own testimony where he alleged that the Warrant of Arrest (which he argued was not valid anyway as it did not bear the seal of the court), was never executed upon him. The defendants never challenged the allegation as to the seal of the court, and to opinion, need not do so, as I am guided by the recent Federal Court decision in *Bird Dominic Jude v. PP* [2014] 4 CLJ 133 and I hold that the plaintiff's conduct clearly showed that the plaintiff was aware that there was a valid warrant of arrest against him at all material times and therefore the claim for unlawful detention cannot be substantiated.

[11] The plaintiff also sought to claim for assault and battery where the only evidence produced before court is through his oral testimony. Crucial witnesses were not called and for that reason, I hold that the plaintiff's claim for unlawful arrest, assault and battery and unlawful detention must fail.

The Tort Of Malicious Prosecution

[12] As discussed earlier, the key elements which are in dispute in this matter before me today are as follows:

(a) Were the defendants acting with reasonable and probable cause in instituting the charges against the plaintiff; and

(b) Was there an element of malice in the defendants' actions.

The Plaintiff's Case Rests On The Absence Of Reasonable And Probable Cause

[13] The classic definition of this element of the tort is set out per Hawkins J in *Hicks v. Faulkner* (1878) 8 QBD 167 at p. 171 as approved by the House of Lords in *Herniman v. Smith* [1938] AC 305 at p. 316:

> An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of the state of circumstances which, assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed,

[14] The question is therefore whether there was belief in the case the defendants were making against the plaintiff? If the answer is no then the plaintiff will have established the absence of reasonable and probable cause.

[15] But even if the answer to the *Hicks* test was "yes", was it a belief in the plaintiff's criminal guilt or the plaintiff's moral guilt? Had the defendants decided on the moral guilt of the plaintiff for not assisting the police in the remand proceedings of Hendrick Tan and later for resisting the unlawful re-arrest of Hendrick Tan at the car park, and then later pigeon holed the plaintiff's moral guilt conveniently into the requirements of s. 216 of the Penal Code? In other words, was the 'honest belief', even if there was one, a reasonable one based on the facts and circumstances of the case? (emphasis added).

[16] The plaintiff in his examination-in-chief testified:

> After I was arrested, I asked the 2nd Defendant the reason for my arrest. He told me that senior police officers and deputy public prosecutors (DPP) were unhappy with me about the way I conducted the remand proceedings which persuaded the court to release Hendrick Tan Boon Kai (hereinafter referred to as "Hendrick Tan") unconditionally on 15 July 2000. The 2nd Defendant told me that I must be charged in court for not helping the police application for the remand of Hendrick Tan. He told me that I had embarrassed the police by objecting at the remand proceedings in respect of Hendrick Tan and I should be made to pay for it. (QA6 line 11-19 page Notes of Proceedings).

[17] These assertions were never successfully challenged by the defence whether during cross-examination of the plaintiff or the testimonies by the defence witnesses. I also find having regard to the plaintiff's demeanour and the absence of contradiction or challenge to his testimony, that he is a truthful and reliable witness. This is a finding of fact. I therefore accept this evidence by the plaintiff. The words '… made to pay for it' clearly establish the state of mind of the first and second defendants at that point.

The Defendants' Case On Reasonable And Probable Cause

[18] The SFC seeks however, to establish an affirmative answer to this test by arguing that there was evidence to support the prosecution in the criminal trial of the plaintiff. Taking into account the antecedent events, however, it is doubtful that the first, second and third defendants acted impartially. They wanted to make the plaintiff 'pay', so they went about the conduct of their investigations with that objective in mind. This lead to the subsequent prosecution of the plaintiff. This can be seen by the lackadaisical way in which the investigation was conducted. The first, second and third defendants failed to trace witnesses who could cast light on their investigation as well as the veracity of the allegations made against the plaintiff. Instead of doing this, the said trio simply arrested the plaintiff with what can only be described as illusory evidence to support or sustain the charge.

[19] The SFC further submitted that DW3, the investigating officer should not be faulted for failing to take statements of certain potential witnesses who may be able to support the allegations against the plaintiff because she testified that she did not know them (See SFC submission para. 54 p. 21).

[20] On this point, the plaintiff's counsel replied that the police owe a duty of care to suspects and their conduct during an investigation should be measured against the standard of a reasonable officer acting in like circumstances.

[21] The learned SFC insisted that the police report lodged by the first defendant was not a false report ie, tainted evidence. At this point, the SFC decided to bring up the public policy argument as he quoted the case of *Rawther v. Abdul Kareem* [1966] 1 LNS 154; [1966] 2 MLJ 201, the Federal Court, at p. 203, as follows:

> Any action for malicious prosecution raises questions of difficulty. On the other hand there is the need to protect the reputation of the individual against unjustified attacks and his pocket against the expense of defending himself against unjustified criminal proceedings. *On the other hand the courts have always recognized the necessity of affording protection to persons who, whatever their real motives, assist in the administration of public justice (See SFC submission paragraph 66 page 25)*
> (Emphasis added).

[22] The SFC then reminded this court that it has a duty to 'cautiously scrutinize the facts of the case to balance between these two interests in order not to offend both interests unjustifiably'.

My Ruling

[23] I tend to agree with the plaintiff's counsel that if the defendants had exercised due skill and diligence in conducting the investigation they would have been able to know who the potential witnesses are instead of relying on the plaintiff who owed them no duty whatsoever to assist them in their investigations against him. Further, with vast government machineries and powers vested by law under the Criminal Procedure Code and Police Act 1967, police officers have the means to conduct investigations. On the other hand, there is no statute or duty that obliges to public to voluntarily assist police in their investigations (See plaintiff's reply para. 22 p. 9).

[24] Over the period of two years and three months the defendants had chosen not to contact the plaintiff to assist them in their investigations, but instead, decided to ambush the plaintiff when the plaintiff had least expected to be wanted by the police. The plaintiff is not a runaway convict whose whereabouts are unknown but a member of the Bar and a political figure whose contact particulars can easily be obtained by the defendants.

[25] Taking this important point into consideration, it can only be concluded that the defendants had already formed in their mind to charge the plaintiff in court at the time the plaintiff was put under arrest. An offence under s. 216 of the Penal Code is a serious offence, but to have taken almost 27 months to produce and present an incomplete investigation before the court must have raised further questions in one's mind. DW3 never at any time issued any process to require the plaintiff to attend her office for the purpose of investigation prior being charged in court on 9 October 2002.

[26] To address this matter, I hold that the material facts presented at the plaintiff's criminal trial were essentially the same facts that arose on the 11 July 2000. This being so, why did the first, second and third defendants wait 27 months before taking action? This delay is without reasonable explanation. I do not accept that this trio would require 27 months to conduct their investigation. Rather, this unseemingly delay supports the plaintiff's stand that there was no reasonable or probable cause against him. Further, such a delay indicates that the eventual arrest of the plaintiff bears all the characteristics of a retributive afterthought on the part of the first, second and third defendants. Having no other means to make the plaintiff 'pay' for embarrassing them, the first, second and third defendants - after waiting 27 months - decided to simply 'let the dice fly' and prosecute the plaintiff.

[27] Notwithstanding the plaintiff's counsel's eloquent submission of how the defendants collectively could not have possibly an honest belief in the guilt of the plaintiff to the extent that the case was fit to be tried, I cannot hold against the fourth defendant. The plaintiff's counsel's submission in pp. 10 to 13 in the submission titled "Plaintiff's Reply" dated 25 March 2014 is referred to, and in a nutshell, the question that was put forth by the plaintiff's counsel was: Did the fourth defendant discharged its duties as a public prosecutor according to the laws of natural justice?

[28] I am particularly attracted to para. 31 of the said submission by the plaintiff's counsel that the prosecutor should not 'hunger for conviction of the accused' and that he should be 'scrupulously fair to the accused and present his case with detachment and without evincing any anxiety to secure a conviction is based upon high policy of impartiality, fairness and justice'.

[29] But in this case, I am not prepared to accept that there is sufficient evidence to impugn the actions of the fourth defendant. Rather, I find that the fourth defendant was mislead by the first, second and third defendants in that the former could not have known that the said trio had an ulterior motive in conducting the investigation and prosecution against the plaintiff.

[30] I am not convinced that the entire chain of events from the remand proceedings of Hendrick Tan culminating in the charge against the plaintiff in court under s. 216 of the Penal Code and the subsequent appeals is not tainted with some form of illegality and procedural impropriety. The offence under s. 216 of the Penal Code states:

> (1) Whenever any person convicted of, or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person was in custody, or is ordered to be apprehended, is punishable with death, he shall be punished with imprisonment

for a term which may extend to seven years, and shall also be liable to fine; if the offence is punishable with imprisonment for life, or imprisonment for ten years, he shall be punished with imprisonment for a term which may extend to three years, with or without fine; and if the offence is punishable with imprisonment for not less than one year but less than ten years, he shall be punished with imprisonment for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence or with fine or with both.

[31] The offence under s. 216 for which the plaintiff was charged for harbouring a murder suspect, is a serious offence, which carry a jail term of up to seven years. Surely an offence as serious as this ought to be given some form of priority, but the fact that the defendants took their time to charge him ought to raise some serious questions not only as to the availability of sufficient evidence to prosecute the plaintiff but also as to the first, second and third defendants' true motives. After all, why wait 27 months? The plaintiff was known to the said trio and his whereabouts could easily be traced. Why not pursue the plaintiff shortly after his alleged 'flight from arrest' with the said Hendrick Tan. Further, as observed by my brother judge – Datuk David Wong J (now JCA) - in the criminal appeal, "the police made no effort to give chase when the plaintiff and the said Hendrick were exiting the precincts of the said District Office on that fateful day. This shows that the first defendant was not serious at all about there being any probable cause in respect of the plaintiff potential criminal liability pursuant to s. 216" (See *PP v. Voon Lee Shan* [2007] 9 CLJ 694).

[32] I am also perplexed as to the lackadaisical attitude of the investigating officer first defendant ("DW3") where she agreed that she had to take statements from all relevant witnesses, including the driver of the car in which the plaintiff travelled, the owner of the car, the reporter named Ms Lai and Hendrick Tan, but she was unable to remember whether she took statements from them.

[33] The determining factor to me was the fact that there was no real attempt to re-arrest Hendrick Tan as I take judicial notice of the judgment of Justice Datuk David Wong Dak Wah (now JCA) in the criminal appeal of the plaintiff that since there was no attempt to re-arrest, the ingredient of 'intention' was doubtful to secure a conviction of s. 216 (See *PP v. Voon Lee Shan* [2007] 9 CLJ 694)

[34] Accordingly, I find that there is no reasonable and probable cause to have pursued the plaintiff since it ought to have been clear to any reasonable police officer at the material time that the element of intent as required by s. 216 was clearly absent.

Malice

[35] Having been persuaded that there is no reasonable and probable cause to prefer the charges against the plaintiff, I shall now direct my mind to the element of malice.

[36] The SFC attempted to present a straightforward case of a police officer carrying out her duties and nothing more, but by now we are already aware of the facts and circumstances leading to the arrest of the plaintiff.

[37] I find the following facts cogent and either undisputed or mere denials on the part of the defendants. I also take note of the SFC's submission on the rule in *Browne v. Dunn* (See SFC Reply p. 3) and I find many parts of the plaintiff witnesses' evidence remain unchallenged:

(a) That the defendants particularly the first defendant was unhappy at the way the plaintiff had conducted the remand proceedings of Hendrick Tan which resulted in Hendrick Tan being released (plaintiff's Submission in Reply para. 28 p. 11);

(b) That there were traces of frustration on the part of the defendants particularly the first defendant as a remand proceeding on a normal day would entail a remand order and sometimes it is a mere formality to produce a suspect in court (See plaintiff's Submission in Reply para. 26 p. 10);

(c) That there was no genuine attempt to re-arrest Hendrick Tan and if there was, it was not *bona fide* and half-hearted;

(d) That there was an incomplete and woefully inadequate investigation by the first defendant/DW3;

(e) That there was an unseemly and inordinate delay of 27 months between the date of the alleged 'flight from arrest' and the arrest of the plaintiff; and

(f) That the authenticity of several documents used during the criminal trial of the plaintiff were dubious, namely the Batu 10 police report 440/2004, the diary of DW2, and the crime bulletin of the day of the attempted re-arrest of Hendrick Tan. Each and every aspect of the first, second and third defendants' account and justification of events leading to the prosecution of the plaintiff is suspect and distinctly lacking in any and all corroborative verisimilitude.

[38] The contempt and malice simmering in the minds of the first, second and third defendants, particularly the first defendant which then contagiously infected the rest of the individuals involved in the prosecution of the plaintiff was palpable, evident and undeniable. This trio's purpose was to cause the plaintiff as much distress, embarrassment, anxiety and inconvenience as possible. It was to make the plaintiff 'pay' for embarrassing the first defendant that day.

[39] The learned SFC cited the authority of *Chan Yoke Sim v. Choong Teck Fook & Ors* [2013] 1 LNS 425; [2014] 2 MLJ 117 (See SFC Submission para. 87 p. 31) the relevant paragraph which stated as follows:

[49] The next question to be asked is what constitutes malice? A

... Malice in the law of tort is a constituent of *malicious prosecution*, defamation, malicious falsehood, and conspiracy **But an act otherwise legal is not made wrongful by an improper motive (*Mayor of Bradford v. Pickles* [1895] AC 587).**
(Emphasis added) B

[40] One must peruse the principle set forth in this authority, especially the words **"But an act otherwise legal is not made wrongful by an improper motive"** with utmost care. The proposition that an act done with any form of improper motive can still remain legal should immediately trigger an alarm within our legal minds back to the principles of natural justice and C
fairness and question ourselves whether this can remain good law. If this principle is allowed to stand, especially in the context of the present case, what then is left to uphold the integrity of the lawmakers and the law enforcers of the country? We are all aware of the maxim 'power corrupts; absolute power tends to corrupt absolutely'. There should never be compromise in the D
state of mind or motive of one in the position of power or authority when carrying out their law enforcement duties. Having said this, the act must in the first place be lawful. If the decision to act is knowingly predicated upon a falsehood, or a set of facts that were known not to exist, then that act cannot be said have been legal. It is unlawful *ab initio* and in cases where a police E
officer nonetheless proceeds to act, such conduct is strong evidence of malice. I find that the first defendant's actions towards the plaintiff in framing against him a s. 216 offence were predicated on a set of fact she knew did not exist. There was no other charge upon which to re-arrest Hendrick Tan. And it is unlawful to re-arrest Hendrick Tan on the same charge for which F
remand was denied. So where is the 'otherwise legal act'? *Ergo*, the first defendant acted unlawfully. I now outline, among others, some of the impugned acts of the first defendant.

[41] The first defendant was unsuccessful in securing a remand order against the said Hendrick Tan due to an error in the process of law. She then G
expressed a desire to re-arrest the said Hendrick Tan, again, without following due the process of law. On top of that, she had to face a vehement defence counsel such as the plaintiff in that flawed attempt to re-arrest the latter's client. Perhaps we may question whether that fateful day was just one of those days where 'bad luck' had befallen her, or was she taking blind orders H
from one of her superiors, or was there a fault in the system itself, or was she just merely incompetent as a police officer?

[42] I now consider her state of mind at the time she was at the carpark with the plaintiff and the said Hendrick Tan. The first defendant did not act professionally as a police officer should because emotions were running high. I
She had testified during the plaintiff's criminal trial that she did not expect the remand proceeding to go against her, and certainly she had not expected

her desire to re-arrest outside the courtroom to be resisted by the plaintiff. The vigorous defence of the said Hendrick Tan by the plaintiff further angered the first defendant and I find based on the plaintiff's and the first defendant's ("DW3") evidence that the latter was 'seething with anger' against the plaintiff.

[43] It has also already been established during the criminal trial of the plaintiff that if the police had wanted to re-arrest Hendrick Tan, they could have easily done so. However, it has not been done, and one can only conclude as to the reason why - because there was never a valid cause to re-arrest Hendrick Tan and the first defendant knew it to be so. *Instead of invoking the proper channel to address her dissatisfaction in the release of Hendrick Tan by filing an appeal or making an application for revision, the first defendant had chosen the path which had ultimately led to the suit today.*
(Emphasis added)

[44] In the recent cases of former Commercial Crimes Investigation Department ("CCID") director Datuk Ramli Yusoff and his lawyer Rosli Dahlan against the Attorney General and others for malicious prosecution, in April this year my learned brother judge Vazeer Alam Mydin Meera, in dismissing the defendants' application to strike out the claim, stated that public servants, including the Attorney-General, do not have immunity from lawsuits in a progressive democratic society. He stated in his judgment:

> I am afraid that the notion of absolute immunity for a public servant, even when *mala fide* or abuse of power in the exercise of their prosecutorial power is alleged in the pleadings, is anathema to modern day notions of accountability.
>
> I agree that deliberate abuse of power by a person holding a public office is tortious and is referred to as misfeasance in public office.
>
> Such a tortious act can arise when an officer actuated by malice, for example, by personal spite or a desire to injure for improper reasons, abuses his power,
>
> This is keeping with developments in modern jurisprudence that absolute immunity for public servants has no place in a progressive democratic society, (See paragraph [77] *Dato' Pahlawan Ramli Yusuff v. Tan Sri Abdul Gani Patail & Ors* [2014] 1 LNS 615).

[45] Accordingly, I find that the cumulative effect of the above amounts to sufficient evidence on the balance of probabilities that the first, second and third defendants acted with malice in arresting and pursuing the plaintiff. In particular, I find the behaviour of the first defendant to be abhorrent. There is no place under the laws of Malaysia for police officers to use their powers for retributive or personal reasons. As such, I hold that the first, second and third defendants are liable to the plaintiff for the tort of malicious prosecution. I find on balance that the fourth defendant that there is insufficient evidence

to establish malice and accordingly the plaintiff's claim against the same fails. As the fifth defendant is the employer of the first, second and third defendants, I find the same to be vicariously liable to the plaintiff for the tort of malicious prosecution, there being no evidence before me that the first, second and third defendants were on a 'frolic of their own'.

The Claim For Defamation

[46] For this claim, I must agree with the SFC that the defence of absolute privilege is applicable and therefore I must reject the plaintiff's claim under this heading (SFC Submission para. 95 p. 34).

Damages

[47] Having concluded that the ingredients of malicious prosecution are present in this proceeding, I now direct my mind to the quantum of damages which are fair and adequate to all parties.

[48] I read with interest the plaintiff's counsel submission on seven points which I sought to clarify in the "clarification" and I am grateful for the diligence put in by both learned counsels. There is no need to repeat the seven points here but in essence, I wanted to probe the state of mind of the defendants particularly the first, second and third defendants in respect of the period from the time Hendrick Tan was released from remand until the arrest of the plaintiff.

[49] In the opening paragraphs of the submission of the plaintiff's counsel, he quoted the speech of US Attorney General Robert H Jackson way back in 1940 and let me now respectfully quote extracts from the plaintiff's counsel's submission:

> [A] Once a person is deprived of his liberty by a malicious act of the Attorney General or public prosecutor his reputation will be deleteriously affected permanently. Even after returning to society at the end of his incarceration he will carry the stain of the disgrace for his whole life; with the accompanying unbearable mental pain and anguish when he is shunned by his friends and peers. That degradation to his person and reputation can never be restored to him however large a compensation he receives for his lost pride and dignity. The stigma that he had kept the company of crooks, robbers, thieves and murderers, while in prison, will continue to cast a long permanent scar over the rest of his life. It will be a tattered life in which cannot ever be made whole again on this side of eternity. He does not carry the pain of the stain of stigma alone. That shame must surely be also shared and borne by his spouse and children and those dear to him; they will also suffer the embarrassment and mental pain he has throughout their lives.
>
> [B] If person's life is so damnified by the malice of the Attorney-General or public prosecutor no amount of compensation, cure or prayers can restore him.

[50] The last paragraph above quoted will surely strike a chord with many of us as not many of us have ever ran into trouble with the law, or like the thought of it. When we were young we were disciplined by the single phrase told to us by our parents "If you are naughty the police with catch you". Surely then, if we do nothing wrong and the 'police' still 'catch' us, simply because they find us - on a personal level - disagreeable, annoying or objectionable, then where does such conduct leave us in terms of the integrity, credibility and professionalism that we have come to expect of the Polis Di Raja Malaysia? The answer is this: such conduct demeans and diminishes society's trust in the police. What the first, second and third defendants did to the plaintiff is precisely the kind of conduct that would, if allowed unchecked, obliterate the public's trust and reliance on the police. How then shall we redress this wrong?

[51] I enlighten myself and take into consideration the defence's argument that the plaintiff must prove the amount of damages he can recover (See *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15, *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611).

[52] I also refer to the case of *Subramaniam Paramasivam & Ors v. Malaysian Airline System Bhd* [2002] 1 CLJ 230 which sets out the two principles of awarding damages, namely:

(a) Restitution or compensation; and

(b) Plaintiff should not profit from it.

(see also *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 5 CLJ 301, *Nam Ho Travel Service (S) Pte Ltd v. Progressive Insurance Sdn Bhd* [1994] 1 CLJ 280).

[53] However, the plaintiff has not adduced any evidence to assist me in quantifying the extent of damage caused to him. I accept that there must have been some damage, but cannot conclude how much because of the absence of medical reports proving anxiety and/or nervous shock nor am I able to quantify any loss of business in respect of the plaintiff's law firm. I also take judicial notice that the plaintiff was politically successful after the fact by being elected as a Yang Berhormat (Member of Parliament).

[54] This is crucial. When a plaintiff sues for damages it is not enough to simply show that the defendant is liable or simply ask the court to assess his claim for damages. A plaintiff must go further and quantify or account for the extent to which he has been damaged. That is, how much money would it take to - as far as money can - restore the plaintiff to the position he was in, prior to the damage to him caused by the plaintiff? This is how compensatory damages are to be assessed. In the absence of such evidence, the court will not engage in simple speculation. In *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43; [1969] 1 MLJ 99, 100 (FC) this was what Ong

Hock Thye FJ (as he then was) said: The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne and McGregor on Damages* (12th edn.) para. 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 at 178: 'plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost: I ask you to give me these damages." They have to prove it.'

[55] Therefore, taking into consideration the circumstances of the matter, I conclude that the plaintiff must have suffered some form of injury to his reputation and feelings when considering his standing in society and the authorities quoted by both parties. However, I find that because there is a distinct lack of evidence as to compensatory damages, I therefore award the plaintiff the nominal sum of RM1. As to exemplary damages I allow an award of RM10,000.

[56] I agree with the learned SFC and disallow claim for aggravated damages.

[57] As to costs I order a sum of RM100,000 in view of the complex jurisprudential arguments put forth in this matter.

[58] Lastly I must thank both learned counsels for their inputs in this case.